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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 661

JOSEPHINE HUGHES URBAN,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Alabama.

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Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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No. .....

JOSEPHINE HUGHES URBAN,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Alabama.

Petitioner prays that a writ of certiorari be issued to review the order and judgment of the Supreme Court of Alabama dated and entered June 13, 1966, dismissing the petition of said Josephine Hughes Urban, appellant in the Supreme Court of Alabama, seeking to have her cause restored to the rehearing docket and for further consideration of her cause.

CITATIONS TO OPINIONS BELOW.

On November 18, 1965, the Supreme Court of Alabama rendered an opinion holding that the appeal of Josephine Hughes Urban, taken from a final judgment of the Circuit

Court of Etowah County, Alabama, should be dismissed, and entered judgment of dismissal accordingly. Her application for a rehearing was overruled. Thereafter a motion was filed on behalf of Mrs. Urban in the Supreme Court of Alabama to restore the case to the rehearing docket and for further consideration, and this motion (characterized in the order and judgment first above mentioned as a petition) was dismissed on September 13, 1966. The only opinion written was the one for the dismissal of the appeal, and is reported as **Urban v. State of Alabama**, 7 Div. 566, ... Ala. ... (not yet reported in the Alabama Reports), 180 So. 2d, page 910. This opinion, the first application for rehearing, the motion (or petition) for restoral on rehearing, and the orders and judgments are shown in Appendix B hereto.

JURISDICTION.

The judgment sought to be reviewed is the one entered on June 13, 1966, dismissing Mrs. Urban's petition seeking to have the cause restored to the rehearing docket, such petition (or motion) asserting as shown in the appendix that the dismissal of Mrs. Urban's appeal by the Supreme Court of Alabama for the reasons shown in the opinion (in substance, that the Clerk of the Circuit Court of Etowah County, Alabama, from which the appeal was taken, failed, as was his statutory duty, to cite other property owners, parties to the condemnation suit below, or give them notice to join in the appeal, if they desired, an action or omission by a state officer, constituted a denial to the appellant, Mrs. Urban, of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, or denied to her the equal protection of the laws in violation of such amendment. This order was made on the last rehearing applied for. The jurisdiction of this court is invoked under 28 USC § 1257(3)).

QUESTION PRESENTED.

Whether the failure of the Clerk of the Circuit Court of Etowah County, Alabama, in preparing and presenting to the Supreme Court of Alabama the record on appeal (as was his statutory obligation to do), to issue to the landowners a summons to unite in the appeal taken by Mrs. Urban if they saw proper to do, and the consequent dismissal of Mrs. Urban's appeal by the Supreme Court, constituted a denial to Mrs. Urban of due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States, or a denial to her of the equal protection of the laws in violation of such amendment (Note: the duty of the Clerk to issue such summons is imposed by a statute of the State of Alabama, § 804, Title 7, Code of 1940).

STATUTE INVOLVED.

The statutory provision involved, just above mentioned, is shown in Appendix A at the end hereof. It is also set out in the report of the opinion, page 911, 180 So. 2d.

STATEMENT.

As shown by the opinion in Appendix B, Mrs. Urban, the appellant, dissatisfied with the award in a condemnation suit brought against her and other landowners by the State of Alabama, appealed to the Alabama Supreme Court. The appellate court never reached the merits of the case, dismissing her appeal and deciding against her solely on the ground that the Clerk of the trial court failed to issue a summons, provided for by state statute, to landowners who were parties to the proceeding below and who had an interest in the land condemned, but who did not appeal from the judgment of condemnation, to

unite in the appeal if they saw fit so to do. Had such summons been issued, and had such landowners declined or failed to join in the appeal, this would not have affected Mrs. Urban's right to a review on the merits in the Supreme Court because, as shown by the statute, she had a right to prosecute an appeal without such joinder. The dismissal occurred not because other landowners failed to join but merely because the Clerk failed to issue the summons. The constitutional questions raised by this petition, were not raised in response to the motion of the appellee, the State of Alabama, to dismiss the appeal, and unfortunately were not raised on the appellant's application for a rehearing. The federal questions, constitutional, here involved were raised for the first time on the second application or petition for a rehearing, after Mrs. Urban employed counsel who represents her on this petition, and who had not participated at all in any of the proceedings until after the first application for a rehearing was overruled.

The constitutional questions were raised for the first time (the first and only opportunity of present counsel) on the motion to restore the case to the rehearing docket and for further consideration (see Appendix B). Such a motion is permissible under Alabama procedure after the overruling of an application for rehearing, provided the procedure of such motion is invoked prior to the expiration of the term of the Supreme Court (such term commences on October 1 of each year and does not expire until the close of June 30 of the following year). Since the motion was filed during the term and decision of the Supreme Court rendered before the expiration thereof, the procedure was timely. In that regard see **Alabama Public Service Commission v. Southern Bell Tel. & Tel.**, 269 Ala. 361, 362, 113 So. 2d 503 (1959), and cases there cited. The statute fixing the Supreme Court's term is also made a part of Appendix A.

While the complications arising out of the failure of Mrs. Urban's first attorney to raise the constitutional questions were involved are readily perceived, it is submitted that in the first place the Supreme Court's dismissal of Mrs. Urban's motion to restore the case to the rehearing docket (characterized therein as a petition), showing that the motion was well understood, constitutes a sufficient dealing with the merits of the constitutional questions, even though, for the first time, to justify this court in passing upon these questions. Furthermore, she should not be penalized by the inadvertence of her first attorney to raise the constitutional questions at an earlier stage in the proceedings, and this court should now, we respectfully submit, accord her a consideration of the questions involved, to the end that the merits of her appeal shall be considered by the Supreme Court of Alabama. The terms of the short order or judgment of the Supreme Court are as follows:

> "The appellant, Josephine Hughes Urban, having heretofore filed in this Court a petition seeking to have this cause restored to the rehearing docket, and the same having been submitted and **duly understood**,
>
> It Is Ordered, Adjudged and Decreed that the petition be, and the same is hereby dismissed."

REASONS FOR GRANTING THE WRIT.

Our position is stated succinctly (we think) in the following grounds of the motion or restoral to the rehearing docket or for other consideration:

> "4. To penalize this appellant as this Court has done on account of what the Clerk of the Circuit Court of Etowah County should have done (a step or steps not required of this appellant), by dismissing the appeal (in lieu of directing or requiring said Clerk to conform to said Code section) constitutes a denial to this appellant of due process of law in violation of

the Fourteenth Amendment of the Constitution of the United States.

5. To penalize this appellant as this Court has done on account of what the Clerk of the Circuit Court of Etowah County should have done (a step or steps not required of this appellant), by dismissing the appeal (in lieu of directing or requiring said Clerk to conform to said Code section) constitutes a denial of the equal protection of the laws to this appellant in violation of the Fourteenth Amendment of the Constitution of the United States."

The appellant, we say, was subjected to a severe penalty, in not having her case heard on the merits, by the action of the Clerk in failing to perform his statutory duty (definitely state action) and by the dismissal of the appeal by the Supreme Court of Alabama (also state action) because of such failure. In lieu of the subjection to such penalty, the Supreme Court should have set aside the dismissal and submission of the cause, and ordered the Clerk to perform the duty, to the end that Mrs. Urban would have a hearing of her appeal on the merits. Although the state may not be under a duty to provide an appeal, when it does so, the procedure (and the interpretation of the state courts in connection with such procedure) "must meet requirements of due process and equal protection." **Pate v. Holman** (U. S. Court of Appeals, 5th Cir.), February 16, 1965, 341 F. 2d, page 764. **Chase v. Page**, C. A. Okl., 1965, 343 F. 2d 167. **Mitchell v. Fay**, D. C. N. Y., 1965, 241 F. Supp. 165. **Tucker v. Meadows**, D. C. Tenn., 1964, 234 F. Supp. 882. **Owsley v. Cunningham**, D. C. Va., 1961, 190 F. Supp. 608. **Chapman v. State of Tex.**, D. C. Tex., 1965, 242 F. Supp. 378. **Board of Firemen's Relief and Retirement Fund Trustees of Texarkana v. Hamilton, Tex.**, 1965, 386 S. W. 2d 754.

There is no provision under the Alabama Statute requiring Mrs. Urban to invoke the issuance of the summons

devolving upon the Clerk whose duty it was to perfect the appeal, and the Supreme Court of Alabama upon presentation of the constitutional questions involved should have taken such steps as to have afforded a hearing to Mrs. Urban, and its dismissal of the appeal and the upholding of that dismissal against the final motion or petition of the appellant (the final result being initiated by the failure of the Clerk, a state officer, to perform his duty) constituted a denial of due process to her under the Fourteenth Amendment to the Federal Constitution, or of equal protection of the laws.

.....

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APPENDIX A.

"Any party against whom a judgment or decree is rendered, may individually appeal to the supreme court or court of appeals without taking the appeal in the name of the other codefendant, but the clerk or register of the court from which the appeal is taken, shall issue a summons when the appeal is so taken, to such as do not join in the appeal to appear before the supreme court or court of appeals at the time to which the appeal is returnable, and unite in said appeal if he sees proper, which summons may be served upon the party, or his attorney of record in the lower court . . ."

§ 804, Title 7, Ala. Code of 1940.

"Regular terms of the supreme court and court of appeals shall commence on the first Monday of October in each year and continue until and including the last day of June of the ensuing year; but the court may, in its discretion, adjourn from time to time."

§ 20, Title 13, Ala. Code of 1940.

APPENDIX B.

The State of Alabama—Judicial Department

The Supreme Court of Alabama

October Term 1965-66

7 Div. 556

Josephine Hughes Urban

v.

State of Alabama

Appeal from Etowah Circuit Court

Lawson, Justice.

The State of Alabama filed in the Probate Court of Etowah County a petition for condemnation of several tracts of land. The petition showed that Josephine Hughes Urban and several other persons owned or claimed to own some right, title or interest in one of the tracts.

The Probate Court granted the petition and appointed commissioners. They reported, assessing damages to Mrs. Urban and others at $33,283. An order of condemnation followed.

The State of Alabama appealed to the Circuit Court of Etowah County, where a judgment was rendered on a jury verdict awarding the landowners compensation in the amount of $6,201. The property owners filed a motion for a new trial, which was later overruled and denied.

Josephine Hughes Urban alone has appealed to this court.

The cause was submitted here on motion and merits.

Motion.

The State has moved that the appeal be dismissed on the ground, among others, that "no notice or citation has been served on any of the other party respondents [landowners], none of whom are parties to this appeal."

Section 804, Title 7, Code 1940, reads in pertinent parts as follows:

> "Any party against whom a judgment or decree is rendered, may individually appeal to the supreme court or court of appeals without taking the appeal in the name of the other codefendant, but the clerk or register of the court from which the appeal is taken, shall issue a summons when the appeal is so taken, to such as do not join in the appeal to appear before the supreme court or court of appeals at the time to which the appeal is returnable, and unite in said appeal if he see proper, which summons may be served upon the party, or his attorney of record in the lower court. . . ."

The appellant, Josephine Hughes Urban, does not contend that any of the other persons interested in the tract of land who were parties to the proceedings in the circuit court were summoned in the manner provided by § 804, Title 7, *supra*; or that any of them signed the appeal bond as principals (**Smith v. Collier**, 210 Ala. 23, 97 So. 101); or that any of them has appeared in this court in such a manner as to constitute a waiver of summons or other notice. **Cosby v. Moore**, 259 Ala. 41, 65 So. 2d 178; **Shaddix v. Wilson**, 261 Ala. 191, 73 So. 2d 751.

It is appellant's insistence that the provisions of § 804, Title 7, *supra*, have no application inasmuch as her appeal was taken under the provisions of § 23, Title 19, Code 1940, which authorizes "any party" to appeal to this court from a final judgment of the circuit court in condemnation proceedings.

The exact question here presented does not appear to have been decided by this court, but an analogous procedural question relating to appeals from the order of condemnation in the probate court to the circuit court has been presented to and determined by this court.

In **Williams v. Jefferson County**, 261 Ala. 76, 72 So. 2d 920, we said in part as follows:

> "The appeal here pursued to the circuit court from the probate court is under section 17, Title 19, and is not in any respect controlled by section 804, Title 7. So that this appeal is to be controlled by applicable principles existing without it. That is, that an appeal not affected by that statute must be taken to the circuit court in the name of all the parties against whom a judgment is rendered. When this is done those not appealing may join in the appeal or give notice of a desire not to do so. Here the Warren claimants appealed, as we have noted, on February 18, 1953, without using the names of all the claimants of tract No. 13. The Terrells came in and joined. Williams tried to do so by giving notice of appeal. This was first allowed and he became a party to the appeal and then his appeal was dismissed on motion. A condemnation as to each tract named in the petition is a separate unit. The claimants are parties in that unit only, not in the others. The controversy as to that tract affects all the claimants jointly. It could not be split up into a trial for each claimant separately. 30 C. J. S., Eminent Domain, § 356, p. 39, note 62. The award is joint. Appeal by any of the parties, section 17, supra, means the parties to any tract. It is necessary for all claimants of a tract to be made parties. 30 C. J. S., Eminent Domain, § 356, p. 39, note 45. . . ." (261 Ala. 83.)

The rule in the **Williams case** was modified by this court in **Harris v. Mobile Housing Board**, 267 Ala. 147,

100 So. 2d 719. In that case, the Housing Board filed an application for condemnation against Mary M. Harris and fourteen other persons who were alleged to own some right, title or interest in one of the tracts. Mary M. Harris appealed from the order of condemnation entered in the Probate Court to the Circuit Court of Mobile County in her own name, but not in the name of the other fourteen defendants. On motion, the circuit court followed our holding in the **Williams case**, *supra*, and dismissed the appeal. Mary M. Harris then appealed to this court. We reversed on the ground that we were wrong in the **Williams case**, *supra*, in holding that an appeal to the circuit court from an order of condemnation entered in the probate court must be taken to the circuit court in the name of all the parties claiming an interest in the tract condemned. However, we recognized the fact that all such claimants should be before the circuit court and to that end spelled out a procedure whereby the clerk of the circuit court is required to give notice to such claimants as do not join in the appeal to appear before the circuit court at the time to which the appeal is returnable, and unite in said appeal if they see proper, which notice may be served upon the party or his attorney of record in the proper court.

The Legislature did not expressly make the provisions of § 804, Title 7, *supra*, applicable to appeals from the probate court to the circuit court. But our holding in the **Harris case**, *supra*, has that effect. This was done because we felt that the rule of the **Williams case**, *supra*, was too harsh, but we recognized the fact that it was essential to let all the claimants of a tract of land condemned in the probate court have an opportunity to be before the circuit court on appeal. We so held, despite the fact that § 17, Title 19, provides in part: "**Any of the parties may appeal** from the order of condemnation [in the probate court] to the circuit court . . . ." (Emphasis supplied).

We cannot say that because § 23, Title 19, Code 1940, says that "any party" may appeal from the circuit court to this court, the requirements of § 804, Title 7, need not be met. To do so would run counter to the rationale of our holding in the **Harris case**, *supra*, where, as shown above, we made the provisions of § 804, Title 7, *supra*, applicable to appeals to the circuit court from orders of condemnation rendered in the probate court despite the fact that § 17, Title 19, Code 1940, provides that "any of the parties" may appeal to the circuit court from an order of condemnation rendered in the probate court.

For want of proper parties when the submission was had the motion to dismiss is granted and the appeal is dismissed.

Appeal Dismissed.

Livingston, C. J., Goodwyn and Coleman, J. J., concur.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 18 day of Nov., 1965.

Richard W. Neal,
Deputy Clerk, Supreme Court of Alabama.

The Supreme Court of Alabama—Thursday, November 18, 1965.

The Court Met Pursuant to Adjournment.

Present: All the Justices.

7th Div. 556.

Josephine Hughes Urban,

v.

State of Alabama.

} Etowah Circuit Court.

Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted on motion and merits and duly examined and understood by the Court, it is considered that appellee's motion to dismiss the appeal is well taken.

It Is Therefore Ordered and Adjudged that the appeal be and the same is hereby dismissed.

It Is Further Ordered and Adjudged that the appellant, and Lesley L. Gilliland and R. E. Cedarholm, sureties on the appeal bond, pay the costs accruing on said appeal in this Court and the Court below.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, it is ordered that execution issue accordingly.

The State of Alabama—Judicial Department

The Supreme Court of Alabama,
October Term, 1965-66.

7 Div. 556.

Josephine Hughes Urban,

vs.

State of Alabama.

Application for Re-Hearing.

Comes now Josephine Hughes Urban by her attorney and petitions this Honorable Court for a re-hearing in the above styled cause and as grounds therefor shows unto this Court the following facts:

Your Applicant for re-hearing would respectfully submit that Section 23, Title 19, Code of Alabama, 1940, is the only method by which a party may appeal from an order of the Circuit Court of Condemnation.

Wherefore, the Premises Considered, your Petitioner prays the order of this Honorable Court to allow your Petitioner a re-hearing of this cause and she will forever pray.

This 3rd day of December, 1965.

Kenneth R. Cain,
Kenneth R. Cain,
900 19th Street South, Suite 222,
Birmingham, Alabama.

I do hereby certify that I have served a copy of the above and foregoing petition for Re-Hearing upon Maurice Bishop, Attorney for the Appellee, State of Alabama, by delivering a copy thereof by hand to his office on this the 3rd day of December, 1965.

Kenneth R. Cain,
Kenneth R. Cain.

The Supreme Court of Alabama—
Thursday, December 16, 1965.

The Court Met Pursuant to Adjournment.

Present: All the Justices.

7th Div. 556.

Josephine Hughes Urban

v.

State of Alabama.

} Etowah Circuit Court.

It Is Ordered that the application for rehearing filed on December 3, 1965, be and the same is hereby overruled.

In the Supreme Court of Alabama.

7th Div. 556.

Josephine Hughes Urban,

Appellant,

v.

State of Alabama,

Appellee.

Motion to Restore Case to Rehearing Docket and for Further Consideration.

Comes the appellee, Josephine Hughes Urban, and hereby respectfully moves that the above styled cause in which opinion was rendered on November 18, 1965, by this Court, and application for rehearing later overruled be restored to the rehearing docket and as grounds for this motion assigns the following, separately and severally:

1. This Court erred in dismissing the appeal in this cause, in lieu of directing the Clerk of the Circuit Court

of Etowah County, or giving such clerk the opportunity to comply with § 804, Title 7, Code of Alabama of 1940, by issuing a summons to those who had not joined in the appeal to appear before the Supreme Court and unite in said appeal if such party or parties not joining should see proper so to do.

2. This Court, instead of dismissing the appeal, should have done whatever was necessary or proper, by setting aside the submission of the appeal, or entering such other order as may have been necessary or proper in lieu of dismissing the appeal, in order that the Clerk of the Circuit Court of Etowah County be required or have the opportunity to comply with § 804, Title 7, Code of Alabama of 1940, to the end that this appellant might have her day before the Supreme Court of Alabama.

3. The requirements of § 807, Title 7, Alabama Code of 1940, prescribe a procedure for the Clerk of the Circuit Court of Etowah County to follow in this cause and not a procedure to be followed by the appellant or her attorney and this Court should have done whatever was necessary or proper, in lieu of dismissing the appeal to direct or require that said Clerk comply with said provisions to the end that this appellant might have her day in Court before the Supreme Court of Alabama.

4. To penalize this appellant as this court has done on account of what the Clerk of the Circuit Court of Etowah County should have done (a step or steps not required of this appellant), by dismissing the appeal (in lieu of directing or requiring said Clerk to conform to said Code section) constitutes a denial to this appellant of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

5. To penalize this appellant as this Court has done on account of what the Clerk of the Circuit Court of

Etowah County should have done (a step or steps not required of this appellant), by dismissing the appeal (in lieu of directing or requiring said Clerk to conform to said Code section) constitutes a denial of the equal protection of the laws to this appellant in violation of the Fourteenth Amendment of the Constitution of the United States.

6. To penalize this appellant as this Court has done on account of what the Clerk of the Circuit Court of Etowah County should have done (a step or steps not required of this appellant), by dismissing the appeal (in lieu of directing or requiring said Clerk to conform to said Code section) constitutes a denial to this appellant of due process of law or equal protection of the laws in violation of the Constitution of the State of Alabama.

Therefore, this Appellant prays that this case be restored to the rehearing docket for reconsideration by this Court in view of each of the separate and several grounds heretofore assigned.

Lange, Simpson, Robinson & Somerville,
By: Reid B. Barnes,
Attorney for Appellant, Josephine Hughes Urban.

Certificate of Service.

I hereby certify that a true and correct copy of the foregoing motion has been served this day on Maurice F. Bishop, attorney for appellee in this cause, by United States Mail, postage prepaid at his office in the Frank Nelson Building, Birmingham, Alabama.

This 5th day of June, 1966.

Reid B. Barnes,
Attorney for Appellant.

The Supreme Court of Alabama—Monday, June 13, 1966.

The Court Met Pursuant to Adjournment.

Present: All the Justices, Except
Simpson, J., Not Sitting.

7th Div. 556, Josephine Hughes Urban, v. State of Alabama.	Etowah Circuit Court.

The appellant, Josephine Hughes Urban, having heretofore filed, in this Court, a petition seeking to have this cause restored to the rehearing docket, and the same having been submitted and duly understood,

It Is Ordered, Adjudged and Decreed that the petition be, and the same is hereby dismissed.

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OCTOBER TERM, 1966.

No. 661.

JOSEPHINE HUGHES URBAN,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

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Due Date: December 1, 1966.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CHestnut 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 661.

JOSEPHINE HUGHES URBAN,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

THIS CASE RAISES NO JURISDICTIONAL QUESTIONS REVIEWABLE UNDER 28 U. S. C., § 1257 (3).

As hereinafter noted, there is no right, privilege, or immunity here involved or claimed under the Constitution or Statutes of the United States which could conceivably confer jurisdiction under 28 U. S. C., § 1257 (3).

QUESTIONS INVOLVED.

At the outset it should be noted and remembered that the constitutional validity of no state statute or procedure is here questioned. Other respondents to this condemnation case who were parties to the proceedings in the Circuit Court were not summoned to appear in the Alabama Supreme Court in the manner provided by Title 7, § 804, of the **1958 Recompiled Code of Alabama** (Code) and the then (second) attorney for the petitioner admittedly did not request that they be so notified. Their failure to be notified was made the basis of the motion of the State of Alabama to dismiss. The suggestion that petitioner had "a constitutional right" to have the other respondents notified, without any request therefor, was not raised by petitioner on her appeal or in her application for rehearing. Accordingly, the basic questions involved are:

(1) Will the Supreme Court of the United States undertake to review proceedings in the state court which were not presented to that court on original submission and brief or on application for rehearing where the well-established uniform rule in the state is that:

> Questions cannot be raised on rehearing where no argument touching it was made in brief upon original submission of appeal.

(2) Is a substantial federal questions presented where the state supreme court denied an application to restore a case to its **rehearing** docket filed almost six months **after** an application for **rehearing** had been denied and where no constitutional questions were raised on original submission or on rehearing?

STATEMENT OF THE CASE.

This is a condemnation (eminent domain) case, filed by the State of Alabama (State) against named respondents, of which petitioner was one, to acquire the property rights therein described for public highway purposes. After hearing in the Probate Court of Etowah County, Alabama, as provided by Chapter 1, Title 19, **Code**, the State appealed to the Circuit Court and demanded a jury trial. All respondents were served with notice of the appeal. The case tried before then Circuit Judge (now United States District Judge for the Southern District of Alabama) Hon. Virgil Pittman, consumed five trial days including a jury view of the property, following which the jury returned its verdict fixing the damages and just compensation to which the respondents were entitled. The order of condemnation was entered on this verdict by the trial court on December 12, 1960. The then attorneys for all respondents filed a motion for a new trial which was overruled and denied by the trial judge. On June 2, 1961, the present petitioner, being only one of the respondents, through her (2nd) attorneys, filed a notice of appeal and security for costs from the Circuit Court of Etowah County to the Supreme Court of Alabama. 17 separate orders were entered by the trial court, at the request of the petitioner, extending the time for filing the transcript with the Alabama Supreme Court. The petitioner owned only an undivided part interest in the property sought to be acquired. Admittedly, "the other persons interested in the tract of land who were parties to the proceedings in the Circuit Court" were not made parties to or given notice of the purported appeal to the Alabama Supreme Court.[1] The State moved that

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1 From aught that appears in the record, all the other respondents were satisfied with the award and did not desire their funds to be held up pending consideration and disposition of the appeal by one of several respondents who holds only an undivided part interest in the property.

the appeal be dismissed on the ground, among others, that "no notice or citation had been served on any of the other party respondents (landowners) as required by Title 7, § 804, **Code.**" On November 18, 1965, the Alabama Supreme Court rendered a unanimous opinion that the appeal should be dismissed "for want of proper parties." **Urban v. State,** 7 Div. 566—Alabama—(not yet reported in Alabama Reports), 180 So. 2d 910.[2] The (second) attorney for the petitioner then filed an application for rehearing in the Alabama Supreme Court which was denied on December 16, 1965.[3]

On June 5, 1966, present (the third) attorneys for the petitioner filed a motion with the Alabama Supreme Court to restore the case to the rehearing docket and for further consideration.[4] This motion admittedly presented "for the first time" the questions now sought to be reviewed which were not briefed or argued on the original submission to the Alabama Supreme Court or on rehearing. This motion was denied by order of the Alabama Supreme Court on June 13, 1966, and it is that order the petitioner now seeks to review.

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2 This decision is set out as Appendix B, pp. 10-14, to the Petition in this cause.

3 Copy of the Order of the Alabama Supreme Court denying the application for rehearing is set out in the Petition for Certiorari, p. 17. The Petition for Rehearing is set out on page 16.

4 This was not a motion for rehearing as petitioner erroneously suggested (Petition, p. 2) but, as subsequently noted by petitioner (p. 17) it was a "Motion to restore the case to the rehearing docket and for further reconsideration". The petition for rehearing under Alabama Supreme Court Rule 34 had been submitted and denied on December 16, 1965, almost 6 months before the motion was filed.

REASONS FOR DENYING THE WRIT.

The petitioner's appeal to the Alabama Supreme Court from the order of condemnation entered in the Circuit Court of Etowah County, Alabama, was dismissed by the Alabama Supreme Court "for want of proper parties" on submission. The Alabama Supreme Court simply applied an act approved April 21, 1911 (Alabama General Acts, 1911, p. 589), contained in each Code since that date, and most recently codified as Title 7, § 804, Code.

It is apparent that no federal question is here involved. Assuming, arguendo, that a federal question is involved (which respondent denies) then it was not raised before or presented to the Alabama Supreme Court by petitioner. It is fundamental that before this Court will grant certiorari to review a decision of the State Supreme Court it must affirmatively appear that a federal question exists and that it was presented to the State Supreme Court and that its decision of the federal question was necessary to its determination of the cause. None of these requirements are here present. The general rule was stated by this Court in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859, as follows:

> "It is a well established principle of this Court that before we will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to determination of the cause. **Honeyman v. Hanan**, 300 U. S. 14, 18; **Lynch v. New York**, 293 U. S. 52, and where the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Following the decision of the Alabama Supreme Court here complained of, the petitioner filed a petition for rehearing with that Court but did not raise or suggest any Federal questions in that petition. As noted, the petition was overruled by the Alabama Supreme Court on December 16, 1965.

With commendable candor, counsel for petitioner here confesses that:

> "The constitutional questions raised by this petition, were not raised in response to the motion of the appellee, the State of Alabama, to dismiss the appeal, and **unfortunately** were not raised on the appellant's application for a rehearing." (Emphasis ours.)

No authorities in point are cited by petitioner to sustain its untenable position. All the cases cited by them relate to the proposition that:

> "A state, having an appellate system in criminal cases, is constitutionally required to provide means of affording adequate and effective review to indigent defendants to the end that they may be placed upon a basis of equality in respect with non-indigents."

The situation here presented is a far cry from that principle.

If there was any constitutional question here involved (which we deny), then it should have been presented to the Alabama Supreme Court on submission. It is a well-established, fundamental, uniform rule in Alabama that:

> "An application for rehearing based on grounds not argued or suggested until after the Supreme Court's judgment will not be considered."

See Alabama Digest, **Appeal & Error**, Key 832 (4) and cases cited; **Robinson v. Allison**, 97 Ala. 596, 12 So. 604;

Goodgame v. Dawson, 242 Ala. 499, 7 So. 2d 77; **Rudolph v. Rudolph**, 251 Ala. 317, 36 So. 2d 902.

The petitioner's contention is not well taken, had it been duly presented. The Alabama Supreme Court uniformly has held that failure to comply with Title 7, § 804, *supra*, will result in dismissal of the appeal either on motion of appellee or ex moro motu. **Warren v. Georgia Fire Insurance Co.**, 10 Ala. App. 650, 65 So. 843; **Benefield v. Benefield**, 25 Ala. App. 568, 150 So. 711; **Matthews v. Donald**, 263 Ala. 575, 83 So. 2d 291; **McKinstry v. Thomas**, 258 Ala. 690, 64 So. 2d 808; **Rush v. Newsom Exterminators**, 261 Ala. 610, 75 So. 2d 112.

If the other parties respondent in the Circuit Court had desired to participate in the appeal (and obviously they did not), they could have (1) joined in the appeal, or (2) voluntarily appeared in the Supreme Court and adopted the assignments of alleged errors, or (3) the notice required by § 84, Title 7 could have been waived by their attorney. They did neither. Where they did not join in or appeal, the uniform decisions of the Alabama Supreme Court, previously noted, required and compelled dismissal.

The only question involved or presented to the Alabama Supreme Court on rehearing was that (Petition, p. 16):

> "§ 23, Title 19, Code of Alabama, 1940, is the only method by which a party may appeal from an order of the Circuit Court of condemnation."

The Alabama Supreme Court rendered no formal opinion in overruling Petitioner's application for rehearing. As noted in **Durley v. Mayo**, 351 U. S. 288, cert. den. 352 U. S. 859:

> "Where the highest Court of the state delivers no opinion and it appears that the judgment might have

rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment."

Thus, in the case here pending:

—There is no federal question involved that could conceivably confer jurisdiction under 28 U. S. C. 1257 (3).

—No federal question was presented or suggested to the Supreme Court of Alabama although the petitioner had the opportunity to do so in its application for rehearing.

—A decision on no federal question was necessary or pertinent to a proper determination of the proceedings by the Alabama Supreme Court.

—It affirmatively appears that the Alabama Supreme Court simply applied a long established uniform rule and statute.

The Alabama Supreme Court rendered the only decision it could under the admitted facts.

Respectfully submitted,

STATE OF ALABAMA,

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Certificate of Service.

I hereby certify that I have served a copy of the foregoing brief in opposition to the Petition for Certitorari on Hon. Reid B. Barnes as counsel of record for the petitioner by personally delivering a copy of same to him on this 16 day of November, 1966.

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